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# Supreme Court of the United States

**October Term, 1947.**

**No. 345**

GARFORD TRUCKING CORPORATION, *et al.*,
*Defendants, Appellants, Petitioners,*

**vs.**

JOSEPH MANN,
*Plaintiff, Appellee, Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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# Supreme Court of the United States

**October Term, 1947.**

**No.** .....

GARFORD TRUCKING CORPORATION ET AL., *Petitioners.*

v.

JOSEPH MANN, *Respondent.*

## BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

### Statement of the Case.

This action was originally brought by the plaintiff in the Massachusetts Federal District Court seeking to recover damages for personal injuries sustained by him on May 9, 1945, on Concord Street, a public highway in that part of the Town of Framingham, Massachusetts, known as Saxonville, as a result of a collision between the plaintiff's automobile and a trailer-truck owned by the defendant Garford Trucking Corporation (R. 61, 224), and being driven by the defendant, J. Albert Glogowski.

The case was tried before a judge and a jury. The case was submitted to the jury on counts one and four of the complaint, predicated upon negligence, respectively, of the corporate and the individual defendant, other counts of the complaint being dismissed. (R. 8, 9, 244, 245.) On November 1, 1946, the jury returned a verdict for the plaintiff on said counts one and four against each defendant in the sum of twenty-nine thousand dollars ($29,000.00) (R. 9, 10), and judgment against each defendant in the latter sum was entered on the verdicts on November 5, 1946 (R. 10).

The defendants appealed to the Circuit Court of Appeals for the First Circuit, which Court, after a hearing, filed a

decision on July 24, 1947 (.... F. (2d) ...., not yet reported) affirming the judgment of the District Court.

The defendants now proceed in this Court on a petition for a writ of certiorari (under the Act of February 13, 1925, Chapter 229, amending #240(a) of the Judicial Code, 43 Sts. 938, 28 U. S. C. A. #347) to review the aforesaid decision of the Circuit Court of Appeals.

ISSUES INVOLVED ON THIS PETITION FOR CERTIORARI.

"Of the various questions raised below and briefed here, only the questions specifically brought forward by the petition for the writ of certiorari will be considered." *Rorick v. Devon Syndicate,* 307 U. S. 299, 303. *Flournoy v. Wiener,* 321 U. S. 253, 259, and cases cited. Rule 38(2) of the Revised Rules of the Supreme Court of the United States.

Although both defendants appealed to the Circuit Court of Appeaus and both defendants have joined in this petition for a writ of certiorari, the questions raised and argued in the Circuit Court of Appeals and in the present petition involved solely the correctness of the judgment entered against the corporate defendant.* And insofar as the

* The defense of contributory negligence was waived by the defendants during the course of the trial in the District Court. (R. 263)

During the course of the oral argument in the Circuit Court of Appeals it was conceded by counsel for the defendants that the jury could find that the driver Glogowski was negligent in his operation of the motor truck and that such negligence contributed to cause the plaintiff's injury. In any event no question was saved in the District Court, or was raised by the defendant's Statement of Points or was argued on the appeal in the Circuit Court of Appeals regarding the sufficiency of the evidence in the latter respects. No motion for a directed verdict under Rule 50 (F. R. C. P.) nor for dismissal under Rule 41b (F. R. C. P.) was presented in the District Court with respect to count four of the complaint predicated on negligence of the individual defendant Glogowski. Various other objections and exceptions taken by counsel for the defendants during the course of the trial (R. 87, 143, 168, 202, 203, 206, 217, 224, 233, 239, 109, 118, 121, 122, 268-270, 249, 109, 118,

case against the corporate defendant is concerned, the only contentions made by said corporate defendant below and in this petition are: (1) That the trial judge and the Circuit Court of Appeals erred in their rulings that testimony of certain declarations made by Glogowski (hereinafter set out) three to ten days after the accident could be taken into consideration by the jury as evidence of Glogowski's state of mind, purpose, belief or intention in travelling on a particular route at the time of the accident as bearing on the question whether he was then acting within the scope of his employment by the corporate defendant; and (2) that in the absence of the foregoing testimony the evidence in the case was insufficient to warrant the jury in finding that at the time of the accident Glogowski was acting within the scope of his employment by the said corporate defendant.

## Statement of Material Facts.

In determining the sufficiency of the evidence to warrant the finding that Glogowski was acting within the scope of his employment "the evidence must be viewed in its aspects most favorable to the plaintiff", *Pilgrim v. MacGibbon,* 313 Mass. 290, 292; *Walsh v. Feinstein,* 251 Mass. 109, 110, 111. "The issue was for the jury, if anywhere in the evidence from any source derived, any facts or combination of circumstances could be found from which a reasonable inference could be drawn in favor of the plaintiff. If such

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121, 122, 265), and assignments of errors predicated thereupon, must be deemed abandoned and waived, since none of such objections or exceptions, or assignments of errors were briefed or argued in the Circuit Court of Appeals or are briefed or argued or set forth in the present petition. *Comm. v. Dyer,* 243 Mass. 472, 508. *Kay v. Audet,* 306 Mass. 337, 338. *Talty v. Freedman Savings & Trust Co.,* 93 U. S. 321, 326. *Schroepfer v. A. S. Abell Co.,* 138 F. (2d) 111, 116; cert. denied, 321 U. S. 763.

combination of circumstances could be found it is immaterial how many other facts or combinations of circumstances could be found which would lead to conclusions adverse to the plaintiff." *Kelly v. Railway, Express Agency, Inc.*, 315 Mass. 301, 302. "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear where there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion, and the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." *Myers v. Reading Co.*, 91 L. E. 1199, 1203 (1946), 67 S. Ct. 1339. *Gunning v. Cooley*, 281 U. S. 90, 94.

The following facts could be found by the jury:

At the time of the accident, on May 9, 1945, the defendant Glogowski was a truck driver in the general employment of the defendant, Garford Trucking Corporation, of South River, New Jersey. (R. 175, 179, 257.) He had been so employed for one and one-half years previous to the accident. (R. 237.) The defendant corporation had a branch office or terminal in Plainville, Massachusetts, part of North Attleboro, Mass., which was in charge of one McCarthy who was the general manager and dispatcher. (R. 179, 234.) On the day before the accident Glogowski had arrived at the Plainville terminal from New Jersey with a truck and an empty trailer. (R. 176, 234.) At ten o'clock on the morning of the accident he was called to work and reported for duty at said terminal with such truck and trailer. (R. 176, 179.) At that time he received instructions from McCarthy to take his truck and empty trailer to the Draper wool storehouse in Framingham,

Mass., leave the empty trailer there, pick up a trailer loaded with wool, and thence to proceed to the Garford main terminal in South River, New Jersey, or to Trenton, New Jersey, (R. 225) which was to be the end of his run. (R. 176, 179.) In accordance with such instructions Glogowski went from Plainville to Draper's in Framingham, a distance of 27 miles (R. 235), (Framingham being almost directly due north of Plainville) dropped the empty trailer, and picked up a trailer loaded with bales of wool with which he was to proceed to New Jersey. (R. 176.)

From the Draper storehouse Glogowski proceeded three-fourths of a mile to the center of the Town of Framingham. There he took Route 126, known as Concord Street which led from the Town of Framingham northerly to a point in Framingham where Route 126 crosses and goes over Route 9, known as the Worcester Turnpike, by way of a bridge or overpass. (R. 47, 48, 62, 136, 139.) Draper's was two miles from the Worcester Turnpike. (R. 45.) Glogowski (according to his own testimony) "took the most direct route [he] knew of" from Draper's to the Turnpike: he couldn't remember the streets or route numbers he followed. (R. 179, 180.) Then he continued to follow the same route, Route 126, in a generally northerly direction from the Worcester Turnpike up to the scene of the accident (R. 184), which occurred at approximately 3:15 or 3:20 in the afternoon, (R. 135, 226, 80) on Concord Street (Route 126) in that part of Framingham known as Saxonville, at the corner of the intersection of Concord Street with Cherry and A Streets. (R. 31, 16, 12-17, 127.) The place of the accident was one-half mile or one mile from the intersection of Route 126 with Route 9, the Worcester Turnpike. (R. 47, 143.)

Route 126 (Concord Street), from the point where it overpasses the Worcester Turnpike in Framingham, and

from the point of the accident, goes northerly into Wayland, Mass. In Wayland, Route 126 joins Route 20, which junction is five miles north of the place where the accident happened in Saxonville. (R. 42, 44, 48.) From Wayland you swing around over Route 20 in a westerly direction, which latter route carries you up through Marlboro, Mass.; thence to a point seven miles just outside of Worcester, on the Boston side of Worcester, at which point Route 20 crosses Route 9 (the Turnpike) by means of an underpass bridge, and swings out from there, as a four-lane highway, into Connecticut 'till it merges with Route 15 which leads all the way down to New York and New Jersey. (R. 42, 44, 49, 60, 63.) Route 20, (also known as the Old Boston Post Road) from Wayland, Marlboro and onward, is a through way; there are stop signs on each side of it; it is a common highway for travel, and is the main route used for transportation into New York and New Jersey. (R. 42, 60, 63.)

There was evidence that, from the point in Framingham where Route 126 went over the Turnpike (Route 9), Glogowski could have turned off Route 126 and taken Route 9 itself, which went to Worcester and ultimately led to the same junction where Route 20 underpassed Route 9, seven miles the Boston side of Worcester. (R. 43, 44, 47, 49, 62.) There was evidence that the distance between the latter junction and the intersection of Route 126 with Route 9 in Framingham, by way of Route 9 on the Turnpike, was about fifteen miles; that the distance between the same two points going by way of Wayland and Sudbury would be about twenty-eight miles. (R. 64.)

Riding on the truck with Glogowski at the time of the accident was a sailor, one Donald Chasse, who lived on a street in Saxonville (Danforth Street) which branched off

Route 126, one-half to three-quarters of a mile from the place of the accident, towards the Town of Saxonville (R. 75, 135, 137, 151). Glogowski picked up the sailor on Route 126 near the point where Route 126 overpasses Route 9, a half mile or so from the scene of the accident. (R. 136, 47, 143.) The jury could find that the exact point at which the sailor boarded the truck was beyond the intersection of Route 126 with Route 9 on the Saxonville side headed towards Saxonville (R. 136, 138, 140); that the rear of the truck (which was 40 feet long) was at that time 100 feet beyond the northerly line of the Turnpike (R. 141); that the sailor was going home on an overnight pass, that he didn't know Glogowski and had never seen him before; that when he got on the truck it started up promptly,—"Glogowski asked him where he was going. The sailor said Saxonville—"; (R. 180) that there was no further talk as to where the rider was going (R. 142) and no talk with the driver relative to the sailor's address in Saxonville or as to how he would get from Route 126 to Danforth Street on which the sailor lived. (R. 166.)

There was further evidence, as hereinafter set out, that Route 9 from Framingham towards Worcester carried much heavier traffic (mostly of the truck and trailer character) and was much hillier than Route 20.

During the course of the trial the plaintiff, on direct examination, testified to the following conversation relative to the accident which took place three to ten days after the accident (R. 124-129; 91-94) at the Framingham Hospital, where the plaintiff and Glogowski were confined, between the latter and one Orrin (Red) Davis who was also a patient in the hospital:

> "Red [Davis] asked Glogowski in the course of the conversation what he was doing on that other road. He said, 'You told me you were going to Worcester.'

"Red said to Glogowski, 'You told me before you were going to Worcester. Why did you go across there?' So Glogowski told Red, 'Oh, I usually take this road. I hit No. 20 over there, and oh, boy! then you can open it up, zoom.' " ( R. 93.)

This conversation was admitted subject to the objection of counsel for the defendants whereupon the court ruled that the statements made by Glogowski bound only Glogowski and not the defendant corporation. (R. 93.)

On cross-examination of the plaintiff, counsel for the defendants asked the witness to state the entire conversation and to repeat it, and examined the plaintiff fully concerning the same conversation. (R. 95, 96.) Thereupon the plaintiff testified that "the two drivers exchanged their experiences as to their driving along certain routes" and "told each other which routes they usually take and which they find better and which they do not"; that this "Red" asked Glogowski "why he takes a road in that direction", to which Glogowski relied that "he finds this much better, not as congested as the other route"; that Glogowski said, "When you hit that road you can open up and go zoom"; further, that "Red" asked Glogowski, "How did this happen?", to which Glogowski replied, "Well, I just couldn't keep it under control. They overloaded me"; that Glogowski also mentioned that this was his third accident and he talked about it in a sort of bragging way; that he said, "Boy, it takes me to break them up, doesn't it?"; that he said, "This is my third accident. It takes me to break them up" or something like that. (R. 97, 98.)

Later in the trial Orrin Davis himself testified, on direct examination by plaintiff's counsel, and subject to defendants' objection, to the same conversation had by the witness with the defendant Glogowski at the hospital, as follows:

"He told me he was going down Concord Street and that he had a high load, that he was top heavy, and that all he remembered about the accident, he just went over. * * * I asked him where he came from. He said he came from Plainville and went to the Draper wool shop and picked up his trailer there, and I asked him where he was going. He said New Jersey, so I asked him, 'What the h--- were you going that way for?' He said, 'I go that way because I can make better time.' And I said, 'Why didn't you take the Turnpike'? He said, 'I go that way to make better time.' * * * He said he could really wreck them for you; that that was his third accident." (R. 127.)

On cross-examination of the same witness, counsel for the defendants here again questioned the witness in reference to the same statements made by Glogowski to which the witness replied in substantially the same above cited language. (R. 130, 134.)

In reference to the foregoing conversations testified to by the plaintiff and the witness Davis, the court in its charge to the jury instructed them as follows:

"Now, you can take that evidence into consideration as evidence of Glogowski's state of mind at the time he travelled over Concord Avenue, and you can take it in consideration in deciding the question—as to what his purposes were. Was his purpose to perform his master's business in going over Concord Avenue in that connection? You can determine that evidence. Because that is evidence of his state of mind. And I charge you it is competent for you to consider in * * * determining whether or not he was working within the scope of his employment, whether when he went along Concord Avenue as he did at the time of the accident, he was performing his master's business or was intending to perform his master's business." (R. 260, 261.)

Counsel for the defendants excepted to the above portion of the charge (R. 269).

**Reasons Submitted for Denial of the Writ.**

(a) WANT OF SUBSTANTIAL OR IMPORTANT QUESTION.

The questions presented by petitioners for review do not, either from their character or importance, require the exercise of the sound judicial discretion of this Court in granting a writ of certiorari. The questions are of local significance only and are not of such general interest and importance as under the rules and practice of this Court warrant their review on certiorari. *Washington Fidelity Insurance Co. v. Burton,* 287 U. S. 97, 101, 102. Rule 38 (5) (b) of the Revised Rules of the Supreme Court. "It is solely when questions of peculiar gravity and general importance are involved that the power of this Court to require a case to be certified can be properly invoked" *U. S. v. Rimer,* 220 U. S. 547, 548. *Forsyth v. Hammond,* 166 U. S. 506, 514. *Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U. S. 387, 392, 393. *Magnum Import Co. v. Coty,* 262 U. S. 159, 163. *McArthur v. U. S.,* 315 U. S. 787. *Zucht v. King,* 260 U. S. 174, 176, 177. *Exchange Drug Co. v. Long,* 281 U. S. 693, 694. *Holmes v. City of Fayetteville,* 281 U. S. 700. "The jurisdiction to grant certiorari is not exercised merely to give the defeated party in the Circuit Court of Appeals another hearing" *Magnum Import Co. v. Coty,* 262 U. S. 159, 163. Importance of the case to the applicant or to private interests because of the amount of money involved, or otherwise, is immaterial. *Field v. U. S.,* 205 U. S. 292, 295, 296. *Hamilton Brown Shoe Co. v. Wolf Bros.,* 240 U. S. 251, 258. *Forsyth v. Hammond,* 166 U. S. 504, 514.

The controverted question in this case is whether the evidence sufficed to establish a finding that Glogowski was acting within the scope of his employment at the time of the accident, which was primarily a question of fact. The pro-

priety of submitting this question to the jury depended essentially upon an appreciation of the evidence and the inferences which could be drawn from it. "Granting of a writ of certiorari would not be warranted merely to review the evidence or inferences drawn from it." *General Talking Pictures Corp. v. Electric Co.*, 304 U. S. 175, 178. *Houston Oil Co. of Texas v. Goodrick*, 245 U. S. 440, 441. *Southern Power Co. v. North Carolina Public Service Co.*, 263 U. S. 508, 509. *United States v. Johnston*, 327 U. S. 106, 113. "Having heard all the evidence the trial court concluded that there was sufficient evidence to warrant a finding in favor of the respondent and the Circuit Court of Appeals reached the same result." *Houston Oil Co. of Texas v. Goodrick*, 245 U. S. 440, 441. "Those findings, being concurrent findings of the two lower courts will be accepted here without re-examination of the evidence." *Allen v. Trust Co. of Georgia*, 326 U. S. 630, 636. *Anderson v. Abbott*, 321 U. S. 349, 356. *U. S. v. O'Donnell*, 303 U. S. 501, 508. *Dt. of Columbia v. Pace*, 320 U. S. 698, 702. *U. S. v. Commercial Credit Co.*, 286 U. S. 63, 67.

(b) No Conflict With Applicable Local Decisions.

The ruling of the District Court and the Circuit Court of Appeals, that the remarks of Glogowski were admissible against the corporate defendant to establish his state of mind, purpose, belief or intention in taking Route 126 out of Framingham rather than Route 9, is not in conflict with applicable decisions of the Commonwealth of Massachusetts. (See cases and authorities cited in argument, *infra*.) If this contention is correct, the writ must be denied without resort to decisions in the federal courts. "State law is the controlling rule of decision in this case as to both substantive and procedural rights of the parties." *Huddleston v. Dyer*, 322 U. S. 232, 236. *Erie R. R. Co. v. Tompkins*, 304

U. S. 64. *Greenough v. Tax Assessors,* 91 L. E. 1274, 1277 (1946). *Klaxton Co. v. Stentor,* 313 U. S. 487, 497.

If, however, there is a permissible difference of opinion in the decisions of Massachusetts on such evidence question, this Court is guided by the rule that "ordinarily it accepts and therefore does not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts. When (this Court) is called upon to decide matters of state law, the expression of the views of the judges of such intermediate federal appellate courts, who are familiar with the intricacies and trends of local law and practice, if not indispensable, is at least highly desirable and an important aid to this Court's determination of state law questions." *Huddleston v. Dyer,* 322 U. S. 232, 237. *Ruhlin v. New York Life Ins. Co.,* 304 U. S. 202, 206. *Hillsborough v. Cromwell,* 326 U. S. 620, 629, 630. "Only in exceptional cases will this Court review a determination of questions of local law by the Circuit Court of Appeals for the District." *Busby v. Electric Utilities Union,* 323 U. S. 72, 75. *District of Columbia v. Pace,* 320 U. S. 698, 702, 703.

(c) No Conflict in Federal Decisions.

In any event the writ should be dismissed, since irrespective of local or state decisions, the evidence was admissible under the federal decisions (See cases and authorities cited in argument, *infra)* and the federal law, where more liberal, governs. Rule 43(a) F. R. C. P. *Norwood v. Great American Indemnity Co.,* 146 F. (2d) 797, 799. *Worcester Park Commission v. U. S.,* 143 F. (2d) 688, 694, 695. The petition does not set forth any decision of the circuit Court of Appeals, interpreting the Massachusetts law on the evidence question involved, which is in conflict with the decision of the Circuit Court below. Rule 38(5)(b), Supreme

Court Rules. The decision of the Circuit Court is not in conflict with the decision in *LaAbra Mining Co. v. U. S.*, 175 U. S. 423, 499, as asserted by the petitioner. The latter case in no way involves any question in reference to the admissibility in evidence of declarations of state of mind, purpose or intention.

(d) No Harmful or Prejudicial Error.

The Circuit Court of Appeals, in affirming the judgment of the District Court, ruled that the evidence of Glogowski's remarks was admissible under Massachusetts law, but that in any event, such evidence was admissible under federal law which governs under Rule 43(a) F. R. C. P.

In further support of the correctness of the judgment of the District Court, the present respondent argued fully and comprehensively in the Circuit Court of Appeals and argues fully in this Court that the testimony of Glogowski's remarks, even if technically erroneous, did not constitute harmful or prejudicial error for the following reasons:

(1) The corporate defendant waived its objections or exceptions to the admission of the evidence as against said defendant.

(2) Error, if any, in receiving proof of the declarations was harmless since the fact that Glogowski was acting within the scope of his employment at the time of the accident was fully established by other evidence in the case, and since the very intention sought to be proved by the declarations was established by other evidence in the record.

(3) The exception of the corporate defendant to the judge's charge ruling that to the declaration of Glogowski were admissible as against said defendant, was not validly taken.

In determining whether it will grant certiorari this Court will also consider the above questions. It need not limit its determination to the grounds upon which the Circuit Court of Appeals put its decision. *Alpha Steamship Corp. v. Cain,* 281 U. S. 642, 643.

## Argument and Authorities.

I. The Evidence and the Permissible Inferences Therefrom Warranted a Finding that Glogowski Was Acting Within the Scope of His Employment at the Time of the Accident.

The principal governing the rights of the parties is well stated in *Fleischner v. Durgin,* 207 Mass. 435, at page 436 [which language was cited by the judge in his instructions to the jury]:

> "The master is liable for the act of a servant in charge of his vehicle when the latter is acting *in the main* (italics ours) with the master's express or implied authority upon his business and in the course of the employment for the purpose of doing the work for which he is engaged. The master is not liable if the servant has abandoned his obligations or is doing something not in compliance with the express or implied authority given, and is not acting in pursuance of the general purpose of his occupation or in connection with the doing of the master's work. Under this rule the employer has been held responsible for wrongs done to third persons by his driver during incidental departures from the scope of the authority conferred by the employment and upon comparatively insignificant deviations from direct routes of travel, but within the general penumbra of the duty for which he is engaged."

In the instant case in accordance with the foregoing evidence, most of which is not in dispute, Glogowski followed the explicit directions of his employer in proceeding with his truck and trailer from Plainville to Draper's in Fram-

ingham and there picking up a trailer loaded with wool which he had been instructed to transport to New Jersey. From Draper's he proceeded with said truck and trailer to the center of the Town of Framingham (a distance of three-fourths of a mile) from which point he started to follow Route 126 (Concord Street) which led to the point of its intersection with Route 9, the Turnpike, approximately two miles further, and he continued to follow Route 126 up to the scene of the accident which was one-half or one mile from the latter intersection. He had taken "the most direct route he knew of" from Draper's to the Turnpike.

[Although there was some evidence of other routes or means of travel to Worcester from Draper's (R. 47, 62), branching off the course which Glogowski followed to the Turnpike, there was no evidence that such other means of travel were more direct routes to New Jersey than the Turnpike or the route which Glogowski was travelling on at the time of the accident. And no argument is made by the corporate defendant that Glogowski was acting outside the scope of his employment is not pursuing such other routes.]

At the place of the accident Glogowski was travelling, with his truck and trailer loaded with the wool for delivery to New Jersey, on a route (126) which led directly to Route 20 (five miles from the scene of the accident), which latter route was described in the evidence as a "through way", "a common highway for travel" and "a main route used for transportation into New York and New Jersey". (R. 42, 60, 63.)

On the above evidence the jury could find that at the time of the accident Glogowski was following his employer's explicit instructions and acting with its express authority in the performance of his duty of transporting the truck and trailer loaded with wool into New Jersey; and

that he was pursuing a route to New Jersey which he could reasonably have been expected by his employer to take in the performance of such duty.

*Fleischner v. Durgin,* 207 Mass. 435, 436.

*Mathewson v. Edison Electric Illuminating Co. of Boston,* 232 Mass. 576, 581.

*Cummings v. Republic Truck Co.,* 241 Mass. 292, 294, 295.

*Pigeon's Case,* 216 Mass. 51, 54.

In support of its argument that Glogowski was acting outside the scope of his employment at the time of the collision, the principal contention of the corporate defendant is, that, from the point of intersection of Route 126 with Route 9 (the Worcester Turnpike), Glogowski did not travel the more direct or shorter route to the junction of Route 9 with Route 20, which the defendant contends would have been via Route 9; and furthermore that such alleged deviation from the more direct route was contrary to express instruction of the defendant corporation.

The jury could find, however, that the only instructions given to Glogowski were to proceed from the Draper storehouse in Framingham to South River or Trenton, New Jersey. The defendant Glogowski so testified. (R. 176, 179). Such were the limit of the instructions given to Glogowski as included in the answer of the defendant corporation to the interrogatory relative to any directions given Glogowski in respect to the trip in question. (R. 225.) The sole evidence that any instruction was given Glogowski as to the route to be taken by him was the testimony of the corporation's witness, McCarthy, to the effect that he told Glogowski to take Route 9 to Route 20. (R. 234.) The jury were not required to believe this testimony of the defendant's witness, even if it were uncontradicted. *McDonough v. Vozzela,* 247 Mass. 552, 558.

*Duff v. Webster,* 315 Mass. 102, 103. Moreover, the latter testimony was contradicted as above stated; and was greatly discredited on cross-examination of the witness. (R. 238 ff.)

Concerning the argument of the defendant corporation that Glogowski did not take the most direct route from the intersection of Route 126 and 9 to the intersection of Route 20 with 9, it should be noted at the outset that the jury could disbelieve the testimony of the police officer Donnelly to the effect that the distance between the two above stated intersections via Route 9 was 15 miles, whereas the distance between the same two points via Route 126 and 20, was 28 miles. (R. 64.) Under such circumstance there was no evidence binding on the plaintiff that Glogowski took a less direct route to the junction of Route 9 and 20. Moreover, the testimony of Donnelly was to the effect that the distance between the two junctions in question via *Wayland and Sudbury* would be about 28 miles. (R. 64.) "The jury could find that such evidence was not evidence of the distance between the two points in question via *Wayland and Marlboro,* which was established by previous evidence to be another means of travel between the same two points". In this state of the record it cannot be said that there was evidence, even if it was binding on the plaintiff, that the route which Glogowski was travelling to the junction of Routes 20 and 9 was less direct than via. Route 9, or in any event, that the former means of travel was 13 miles longer than the latter and the means of travel which the jury could find Glogowski was following.

However if it be assumed on the state of the record [and the plaintiff does not concede this point] that there was testimony, and testimony by which the plaintiff was bound, that Route 126 to Route 20 in Wayland and thence to New Jersey, which course Glogowski could have been found to

be pursuing, was a route of travel 13 miles less direct than Route 9 to the same destination, such isolated facts did not on all the circumstances require a finding as a matter of law that Glogowski was acting outside the scope of his employment in following the less direct route.

"Deviations by a servant from the regular course, as travelling by a longer route than is required to reach his destination in the performance of his master's business, is not conclusive evidence that he is not then acting within the scope of his employment."

*Mathewson v. Edison Electric Illuminating Co. of Boston*, 232 Mass. 576, 581.

*Fleischner v. Durgin*, 207 Mass. 435, 436.

*Hayes v. Wilkens*, 194 Mass. 223, 226.

*Reynolds v. Denholm*, 213 Mass. 576, 578.

*Lewandowski v. Cohen*, 237 Mass. 125, 126.

*McKeever v. Ratcliffe*, 218 Mass. 17, 20, 21.

See also:

*Ouimete v. Harris*, 219 Mass. 466, 470.

*Hayes v. Lumberman's Mutual Casualty Co.*, 310 Mass. 81, 84.

"In by far the greater number of such cases where the master's responsibility turns, as in the present case, principally upon the mere extent of deviation, the question is and must remain a question of fact depending upon the degree of diviation and all the attendant circumstances" . . . In order to determine or suspend the master's responsibility there must be "not merely deviation, but a total departure from the course of the master's business, so that the servant may be said to be 'on a frolic of his own'."

*Ritchie v. Walker*, 63 Conn. 155, 161, 162 (cited with approval in *Mathewson v. Edison Elec. Ill. Co.*, 232 Mass. 576, 581).

*Riley v. Standard Oil Co.*, 231 N. Y. 301, 305, 306, (cited in support of *Cummings v. Republic Truck Co.*, 241 Mass. 292, 294, 295).

In the instant case there was evidence of comparison between Route 9 (the Worcester Turnpike) and Route 20 as respected the volume and type or character of traffic that moved along these respective routes at the approximate time of day at which the accident occurred, in the vicinity of the location of the accident, in and around the Town of Framingham, and thence out to New York. The jury could find from the testimony that on the average day, between 2:00 and 3:30 in the afternoon, as traffic moved on these respective routes in and around the Town of Framingham and thence out to New York, Route 9 (the Worcester Turnpike) carried the heaviest volume of traffic as compared with Route 20 (R. 66, 67, 68); that regarding the character and type of traffic that moved along these two highways on the average day, the heaviest traffic at such hours of the day was trucks and such heaviest traffic went on Route 9 (R. 67, 68); that on the average day of the week in the afternoon, around two, three or four o'clock, or between the hours of two and four, you get such heavy traffic on Route 9 that there is a continual flow of trucks and cars moving both directions fifty feet apart or so, continuously (R. 68), —"very heavy traffic" (R. 68),—"a flowing and continual stream of traffic" (R. 69); that such vehicles "are stepping right along" (R. 69); that two thousand vehicles an hour, four thousand between the hours of two and four in the afternoon every average day during the week, travel along the turnpike or Route 9 going by a given point thereon; that at that time of day the largest percentage, 75 to 80 per cent, of such vehicles are trucks, the majority of them going west towards New York. (R. 69.)

Respecting the volume and character of hills along these two different routes to the junction of Route 9 with Route 20, there was evidence that Route 20 had less hills than

Route 9, (R. 43) and less hills of considerable height to the apex than Route 9 (R. 43); that Route 9 had some very steep hills on it (R. 42); that there was one steep hill on Route 20 coming into Marlboro, but that Route 9 on the way to Worcester had five or six very steep hills (R. 43, 44).

The vehicle being operated by Glogowski was a big Autocar truck attached or linked to a Freuhauf tractor-trailer, (R. 176, 24, 25) which were two separate units. (R. 60.) The truck and trailer was 40 feet long. (R. 236, 141.) The tractor was 12 feet wide from wheel to wheel. (R. 142.) The trailer was 30 feet long (R. 20), about 8 feet wide (R. 177, 178, 236), 7½ feet high, from the floor thereof, and 11 feet 9 inches high from the ground. (R. 178, 236.) The trailer was heavily loaded—, overloaded—, (R. 97, 130) with large and heavy bales of wool, which bales were 15 feet long, and 6 feet wide (R. 142, 176, 20, 31, 61) and weighing at least 40,000 pounds.

It is a matter of common knowledge that motor trucks, (particularly a large tractor-trailer of the latter dimensions heavily loaded with wool) can be operated much more easily, quickly and safely over a road with little or no traffic, no hills, or no very steep hills, than over a road where their progress is impeded by the presence of hills or very steep hills, and the presence of a continual flow or stream of other vehicles and traffic, especially when the greatest percentage of such traffic is heavy traffic of the truck and trailer character.

> "These are proper matters to be considered in determining whether the deviation from a regular or more direct route is an abandonment of the master's business. . . . The jury may have found that the driver in adopting the course he took under the foregoing circumstances, chose the quickest and best way to reach his destination, and that by so doing he had not abandoned

his master's business but was acting in the course of his employment."

*Mathewson v. Edison Electric Illuminating Co.*, 232 Mass. 576, 581, and cases cited.
*Hayes v. Wilkens*, 194 Mass. 223, 226.
*Lewandowski v. Cohen*, 237 Mass. 125, 126.
*Ritchie v. Walker*, 63 Conn. 155, 161, 162.
*Riley v. Standard Oil Co.*, 231 N. Y. 301, 305, 306.

A finding that Glogowski chose "the quickest and best way to reach his destination" was similarly warranted by the evidence of the declarations of Glogowski respecting his intention or state of mind in travelling on Route 126 at the time and place of the accident. These statements were, in substance, that he was going to New Jersey (R. 127), and that he took Route 126 to Route 20 towards Worcester because he could "open it up" on Route 20 (R. 93, 97, 98), that Route 20 was "much better, not as congested as the other route" (R. 97, 98) and he could "make better time." (R. 127.) His intention in this respect was material.

*Mathewson v. Edison Elec. Ill. Co. of Boston*, 232 Mass. 576, 580, 582.

Furthermore, even if the foregoing deviation was not fully warranted by the circumstance that Route 9 towards Worcester was much more congested and hilly than Route 126 and Route 20, such deviation of the driver from the more direct route of travel could be found by the jury to have been "slight" and "comparatively insignificant" when viewed in connection with the trip he was authorized to make to his ultimate destination all the way down to New Jersey.

In this respect it must be noted that Glogowski's deviation from Route 9 at the time of the accident was a mere one-half or one mile. That was the distance from the intersection of Route 126 and Route 9 to the scene of the

accident. (R. 47, 143.) The degree or extent of the servant's deviation is determined with reference to his actual deviation at the time and place of the collision, notwithstanding "any unexecuted intention [on his part] to deviate further from the [more] direct route," *Fitzgerald v. Boston & Northern Street Railway,* 214 Mass. 435, 439; *Pigeon's Case,* 216 Mass. 51, 54. The jury could indisputably find that a deviation of one-half or one mile was "slight" and "comparably insignificant."

However the same finding would be warranted if the extent of his deviation is considered with reference to the distance the jury could find he intended to travel before he rejoined Route 9, which deviation, it may be here assumed, the jury could have found to have been 13 miles. The source of Glogowski's authorized trip was Plainville. (R. 176, 179.) From there he travelled 27 miles to Draper's in the Town of Framingham (R. 235) and thence approximately 2 miles to the intersection of Route 126 with Route 9. (R. 45.) Route 9 from the latter point to its junction with Route 20 outside of Worcester was at least 15 miles. (R. 64.) It is a matter of common knowledge of which the court will take judicial notice that Framingham, Mass., is an outlying suburb of the City of Boston, *Town of Burlington v. Dunn,* 318 Mass. 216, 221, and that the distance from Boston to Trenton, New Jersey, exceeds 250 miles, at a very conservative estimate. 1947 World Almanac, p. 728 [Boston to Trenton, N. J., 296 miles; *Ibid* p. 727, Boston to New York, N. Y., 221 miles]; *Hoyt v. Russell,* 117 U. S. 401, 404, 405; *The Wahkeena,* 51 F. (2d) 106, 108, and cases cited. *In Re New Hampshire Development Co.,* 62 F. Supp. 726, 727. Under such circumstances Glogowski's intended deviation of (allegedly) 13 miles was not so disproportionate to the length of the trip he was authorized to make as to amount to an abandonment of his

employment terminating his master's responsibility for his negligence.

*Fleischner v. Durgin,* 207 Mass. 435, 436.
*Lewandowski v. Cohen,* 237 Mass. 125, 126.
*Reynolds v. Denholm,* 213 Mass. 576, 578.
*Cummings v. Republic Truck Co.,* 241 Mass. 292, 294, 295.

Considering the long distance involved, considering that there was no time allotted Glogowski within which he was to make the trip, and having in mind that the truck when it left Draper's was heavily loaded with wool for delivery to New Jersey, the jury could properly find that Glogowski had not abandoned the performance of his duty and was acting *in the main* in furtherance of the business of his employer in transporting the wool to New Jersey.

*Riley v. Standard Oil Co.,* 231 N. Y. 301, 304-306 (followed in *Cummings v. Republic Truck Co.,* 241 Mass. 292, 294, 295).
*Ritchie v. Walker,* 63 Conn. 155, 161, 162.
*Sawyer's Case,* 315 Mass. 75, 79.

There is no merit in the defendant corporation's further contention that at the time of the accident Glogowski was as a matter of law acting outside the scope of his employment or on an independent project of his own in taking on the sailor, Chasse, as a rider.

There was no evidence binding on the plaintiff that in picking up a rider Glogowski was acting in violation of any rule or instruction of the defendant corporation. The jury could discredit the testimony of the defendant Glogowski that he "was not allowed riders", (R. 180) even if such testimony was properly susceptible of the interpretation that there was a rule of the corporation prohibiting riders. See *Sawyer's Case,* 315 Mass. 75, 79, 80.

In any event since the jury could find that in travelling along Route 126 through Saxonville towards Route 20, Glogowski was travelling on a route which he could reasonably be expected by his employer to take in the performance of his duty in transporting the wool to New Jersey, the fact that at the time of the accident there was a rider on the truck who had been taken on contrary to a rule of the employer, could be found to be nothing more than a condition or attendant circumstance not in any way in derogation or attenuation of Glogowski's main or sole purpose to perform his above stated duty.

*Cummings v. Republic Truck Co.*, 241 Mass. 292, 295.

*Donahue v. Voremberg*, 227 Mass. 1, 5, 6.

*Mathewson v. Edison Electric Illuminating Co.*, 232 Mass. 576, 580, 581.

*Sawyer's Case*, 315 Mass. 75, 80.

The decision in *O'Leary v. Fash*, 245 Mass. 123, 125, cited by the defendant, is distinguishable. The difference in the liability of an employer to a passenger, who is allowed by an agent to ride on the employer's motor vehicle without the authority and consent of the employer, and the liability of an employer to a person who is run down in the street by an agent transporting a rider, is pointed out in that case and also in *Driscoll v. Scanlon*, 165 Mass. 348, 349.

What has been above stated disposes of the defendant corporation's suggestion that Glogowski pursued Route 126 beyond the Turnpike merely to transport the sailor to his home and for no other apparent purpose related to his employment. In this respect, however, there was evidence that the place where the sailor boarded the truck was beyond the Turnpike on the Saxonville side headed towards Saxonville (R. 136, 138, 140); that the rear of the truck

(which was 40 feet long) was at that time 100 feet beyond the northerly line of the Turnpike. (R. 141.) Moreover, the sailor was going home on an overnight pass; he didn't know Glogowski and had never seen him before. (R. 141.) When he got on the truck it started up promptly. "Glogowski asked him where he was going. The sailor said Saxonville. Glogowski proceeded." (R. 180.) There was no further talk as to where the rider was going (R. 142), and no talk with the driver relative to the sailor's address in Saxonville or as to how he would get from Route 126 to Danforth Street on which the sailor lived. (R. 166.) The foregoing testimony clearly substantiates the permissible finding of the jury that Glogowski, at the time he picked up the rider, was already on his way on Route 126 towards Saxonville in the performance of his duties, and repels the inference that he had abandoned such duties under all the circumstances for the mere accommodation of a person who was a complete stranger and whose address in Saxonville was unknown to him. (See Sawyer's Case, 315 Mass. 75, 79.)

Respecting the corporation's contention that Glogowski was acting outside the scope of his employment in that, at the time of the accident, he was violating the rate of speed limitations prescribed by the Office of Defense Transportation, it is sufficient to state that such a suggestion is a *reductio ad absurdum*". There was no evidence in the record that any speed limitations were imposed on Glogowski by the corporate defendant itself. It would follow from the proposed argument that any servant or agent who violated any provision of law relative to the operation of motor vehicles, would *ipso facto* abrogate his employer's liability for his negligent acts contrary to the well established rules of *respondeat superior*. Moreover, there is no

evidence in the record that the defendant corporation was a carrier in interstate commerce subject to the regulations of the Federal Office of Defense Transportation, and such a fact cannot be assumed.

II. The Declarations of Glogowski Were Admissible in Evidence.

The trial judge did not err in ruling that the subsequent declarations of Glogowski contained in his conversation with Davis could be taken into consideration by the jury as evidence of Glokowski's state of mind, purpose, or intention in travelling over Concord Street at the time of the accident as bearing on the question whether he was then engaged in the scope of his employment.

Glogowski's intention in this respect was material.

*Mathewson v. Edison Electric Illuminating Co.*, 232 Mass. 576, 580, 582.

> "In determining questions [of evidence], a federal trial court has great latitude under Rule 43(a) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, which provides, in material part, that the statute or rule, federal or state, which favors the reception of proffered evidence shall govern its admissibility". *Norwood v. Great American Indemnity Co.*, 146 F. (2d) 797, 799. A federal court "must apply the more generous rule of evidence". *Worcester County Park Commission v. United States*, 143 F. (2d) 688, 694, 695.

Where the state of mind, purpose or intention of a person at a particular time, or in doing a particular act, is in issue, his declarations showing such intention, whether prior, contemporaneous or subsequent, are properly admissible if sufficiently near in point of time to afford a reasonable inference that such was his intention at the time in question. This is the firmly established rule in Massachusetts. *Pick-*

*ens v. Davis,* 134 Mass. 252, 257, 258. *Lane v. Moore,* 151 Mass. 87, 89, 90-92. *Aldrich v. Aldrich,* 215 Mass. 164, 170. *Commonwealth v. Trefethen,* 157 Mass. 180, 186, 190. *Shailer v. Bumstead,* 99 Mass. 112, 122, 123. *Crosby v. Mutual Life Ins. Co.,* 221 Mass. 461, 463, 464. *Commonwealth v. Damon,* 136 Mass. 441, 448, 449. *Hagar v. Norton,* 188 Mass. 47, 52. *Brady v. Doherty,* 253 Mass. 518, 522. *Mahan v. Perkins,* 274 Mass. 176, 179. *Malone v. Walsh,* 315 Mass. 484, 490. Wigmore, Evidence (3rd Ed.), Vol. VI, #1729, p. 91, #1714, p. 60, #1726 (2), pp. 87, 88; Vol. II, ##233, 241, 242(3).

Such declarations made with no apparent motive for misstatement may be better evidence of the maker's state of mind at the time, then the subsequent testimony of the same persons.

*Elmer v. Fessendon,* 151 Mass. 359, 362.
Starkie, Evidence, (10th Am. Ed.) 89.
Wigmore, Evidence, (3rd Ed.) #1714, Vol. VI, p. 60.

In accordance with the foregoing cases the declarations of Glogowski relative to why he was travelling on Concord Street on Route 126 at the time of the accident, and relative to why, in his experiences as a truck driver, he ordinarily travelled on such route on his way towards Worcester, were equally admissible in evidence as indicating his probable state of mind, purpose or intention in taking such route at the time of the accident. Cases cited *ante.* Also: *Partridge v. United Elastic Corp.,* 288 Mass. 138, 141. *Inness v. Boston Revere Beach & Lynn R. R. Co.,* 168 Mass. 433, 434, 435. *Comm. v. Ramey,* 243 Mass. 394, 397, *Comm. v. Rubin,* 318 Mass. 587, 588, 589.

Whether such declarations were sufficiently near in point of time to have some natural bearing upon his state of

mind or intention at the time of the accident was a preliminary question of fact largely within the discretion of the trial judge. His determination of this preliminary question must be accepted as conclusive on the circumstances of the instant case, such declarations being made only three to ten days after the accident.

*Lane v. Moore,* 151 Mass. 87, 91.
*Comm. v. Trefethen,* 157 Mass. 180, 183, 184.
*McCoy v. Jordan,* 184 Mass. 575, 576, 577.
*Howes v. Colburn,* 165 Mass. 385, 387.

The declarations were admissible against the corporate defendant. They indicated the servant's intention or state of mind in travelling over Route 126 at the time of the accident, which intention or state of mind was a fact relevant to the fact in issue, whether he was at such time engaged in the course of his employment by the corporate defendant. They were not direct evidence of the external fact that he was so engaged, but merely circumstantial or evidential, to be considered in connection with all the other circumstances in the case bearing upon the question. As such, the declarations evidencing his intention constitute an exception to the hearsay rule, are admissible in evidence though not technically forming part of the *res gestae,* and are not subject to the rule that declarations by an agent in the nature of direct admissions of liability are not binding on the principal in the absence of independent evidence of the authority of the alleged agent to make them. *Lane v. Moore,* 151 Mass. 87, 90, 91. *Pickens v. Davis,* 134 Mass. 252, 257, 258. *Comm. v. Trefethen,* 157 Mass. 180, 185, 186, 188. *Aldrich v. Aldrich,* 215 Mass. 164, 170. *Inness v. Boston, Revere Beach & Lynn R. R. Co.,* 168 Mass. 433, 434, 435. *Pickens v. Davis,* 134 Mass. 252, 257, 258. *Potter v. Baldwin,* 133 Mass. 427, 428, 429. *State v. Journey,* 115 Conn. 344, 351, and cases cited. *In Re Coleman,* 53 Idaho

339, 343, 344. Wigmore, Evidence (3rd Ed.) Vol. VI, #1715, p. 62; #1726, pp. 87, 88.

See Restatement, Agency, #289, Comment C.

> "*Statements of state of mind.* Evidence of statements by an agent introduced in order to show the purpose for which he did an act or to show his knowledge or state of mind is admissible in favor of and *against the principal* (italics ours) under the rules relating to the introduction of evidence for this purpose. Statements by an agent are not excluded because made by an agent. If his knowledge or state of mind or purpose is relevant to the cause of action which is being brought, either party may introduce evidence relevant to show this."

The same rule obtains in the federal courts respecting the admissibility of declarations evidencing state of mind, purpose or intention at a particular time or in doing a particular act. *Lawlor v. Loewe,* 235 U. S. 522, 536. "Such statements, though hearsay, are admissible to prove the state of mind of the declarant if that be in issue." *Greater New York C. of C. v. U. S.,* 47 F. (2d) 156, 159. "Such evidence is an exception to the hearsay rule, and is well recognized." *American Cooperative Serum Ass'n v. Anchor Serum Co.,* 153 F. (2d) 907, 912 (1946) and cases and authorities cited. "It is well established that the state of a person's mind on a certain date may be proved by his subsequent statements and declarations." *U. S. v. Schuchhardt,* 49 F. Supp. 567, 568 (1943) and cases cited. *U. S. v. Jogwick,* 51 F. Supp. 2, 3. *Glaser v. United States,* 289 F. 255, 256, cert. denied, 263 U. S. 700. *U. S. v. Schlotfeldt,* 136 F. (2d) 935, 938. See *Buckeye Powder Co. v. DuPont Powder Co.,* 248 U. S. 55, 65. See also: *Tobin v. Walkin Shaw,* 23 F. C. 1346, 1347, 1348, (C. C.), Fed. Cas. No. 14,070. *Hawes v. Victoria Mining Co.,* 160 U. S. 303, 318. *Arab Corporation v. Bruce,* 142 F. (2d) 604, 608, note 9. *National Labor Relations Board v. Southern Wood Pre-*

*serving Co.*, 135 F. (2d) 606, 607. *Chicago and N. W. Ry. Co. v. McKenna*, 74 F. (2d) 155, 157. *Kerr v. Modern Woodmen of America*, 117 F. 593, 595. *U. S. v. Gentry*, 119 F. 70, 73. *U. S. v. Wells*, 283 U. S. 102, 113. *Bankers Trust Co. v. Higgins*, 65 F. Supp. 836, 839. *Wright v. Bragg*, 106 F. 25.

The substance of Glogowski's remarks was that he took Route 126 to Route 20 "over there" to Worcester and New Jersey because the latter route was not as congested as Route 9 and that in his opinion he could make better time on Route 126 and Route 20. Such evidence was admissible to show Glogowski's belief, state of mind, motive or intention in following one route rather than the other. It is true, as argued by the petitioners, that such declarations were not admissible to prove the truth of the facts recited therein, viz. that Route 20 was in fact less congested than Route 9 and that better time could in fact be made on Route 20 than on Route 9. Lane v. Moore, 151 Mass. 87, 90. But since the petitioners did not ask for an instruction limiting the probative force of the evidence to the issue of state of mind, but attempted rather to exclude the evidence entirely, they cannot now claim error in its admission. *Greater New York Live Poultry Chamber of Commerce v. United States*, 47 F. (2d) 156, 159 (C. C. A. 2) and cases and authorities cited. *Elmer v. Fessenden*, 151 Mass. 359, 361. *Hubbard v. Allyn*, 200 Mass. 166, 171. *Weston v. Barnicoat*, 175 Mass. 454, 456. *Palmer v. Hoffman*, 318 U. S. 109, 119 and cases cited. *Eastman v. U. S.*, 153 F. (2d) 80, 84; cert. denied 66 S. Ct. 1342. Rule 51 (F. R. C. P.). *Salonen v. Paanenem*, 1947 Mass. Ad. Sh. 29, 36.

*Sylvester v. New York, New Haven & Hartford R. R.*, 217 Mass. 148, 152, *Jackson v. Colonial Provision Co., Inc.*, 314 Mass. 177, 179, 180, and *Du Bois v. Powdrell*, 271 Mass.

394, 397, cited by the defendant as authority for the proposition that an agent may not by his own declaration show the nature and extent of his authority, are inapplicable here. The declarations in the instant case were not declarations of the latter character; nor was the nature and extent of Glogowski's authority a question in dispute. See *Nowell v. Chipman,* 170 Mass. 340, 343, 344.

*Conklin v. Consolidated Railway,* 196 Mass. 302, is also distinguishable from the instant case. The state of mind or intention of the agent in that case was not an issue or a fact relevant to a fact in issue. The fact in issue was whether the agent assaulted the plaintiff. The intention or state of mind of the agent at the time of the assault, or the intention or state of mind with which he committed the assault, was entirely irrelevant and immaterial on the issues involved. *Lane v. Moore,* 151 Mass. 87, 90. *Pickens v. Davis,* 134 Mass. 252, 257, 258. As pointed out in *Bonino v. Caledonio,* 144 Mass. 299, 302 (which case is stated in the *Conklin case,* p. 307, to be exactly the converse of the situation presented in the *Conklin case)* "no substantive question of intention was involved in the proof that the defendant first assaulted the plaintiff, which would make evidence of a (prior intention) competent in proof of that fact". See also for adverse comment on the *Conklin case,* Wigmore, Evidence (3rd Ed.) #106, note 1 (cited in the opinion of the Circuit Court).

III. The Admission of Such Evidence, Even if Technically Erroneous, Did Not Constitute Harmful Error.

A. *The Corporate Defendant Waived its Objections to the Competency of the Evidence.*

Assuming that there may have been any technical error of law in the judge's ruling in his charge to the jury respecting the testimony of the conversation had between Glogow-

ski and Davis, any such assumed error cannot be availed of by the corporate defendant as a ground for reversal or the granting of a new trial. The objections taken by counsel for the defendants to the admission of such testimony in direct examination of the plaintiff and the witness Davis cannot be sustained as a ground for exception to the charge, even if erroneous, for the reason that without objection or exception both witnesses later testified to identically and substantially the same conversation,—and more—, on cross-examination by counsel for the defendants. It has been repeatedly held in Massachusetts and in the Federal Courts that, where identical or similar testimony is brought out in cross-examination without objection or exception, or reservation thereof, the objection made in chief is waived and abandoned and the testimony becomes competent evidence entitled to its full probative value on all issues in the case to which it is applicable, as if no prior objection lay to its admission. *DiAngelo v. United Markets, Inc.*, 319 Mass. 143, 145. *Commonwealth v. Parrotta*, 316 Mass. 307, 312, 313. *Commonwealth v. Capalbo*, 308 Mass. 376, 382. *Bendett v. Bendett*, 315 Mass. 59, 65, 66. *Commonwealth v. Mannos*, 311 Mass. 94, 114, 115. *Ryder v. Board of Health of Lexington*, 273 Mass. 177, 179, 180. *Morrison v. Lawrence*, 186 Mass. 456, 458. *Perivoliotis v. Eveleth*, 251 Mass. 444, 446, 447. *Mathewson v. Edison Electric Illuminating Co.*, 232 Mass. 576, 582. *Noyes v. Gagnon*, 225 Mass. 580, 588. Mass. G. L. (Ter. Ed.) C. 231, #132. *Trouser Corporation v. Goodman & Theise*, 153 F. (2d) 284, 287, 288. *Norwood v. Great American Indemnity Co.*, 146 F. (2d) 797, 799, 800. *United States v. Fried*, 149 F. (2d) 1011, 1013, *Westchester County Park Commission v. United States*, 143 F. (2d) 688, 694, 695; cert. denied, 323 U. S. 726. *Milwaukee Mechanics Ins. Co. v. Oliver*, 139 F. (2d) 405, 407. *Snipes v. Augusta-Aiken Ry. & Elec. Co.*, 151 S. C. 391, 396.

For examples:

In *DiAngelo v. United Markets, Inc.*, 319 Mass. 143, at 145, the court stated, in disposing of an exception taken by the defendant to certain testimony elicited in direct examination of the plaintiff:

> "This exception cannot be sustained because without objection she [plaintiff] later testified in identical language on cross-examination."
>
> *Commonwealth v. Parrotta*, 316 Mass. 307, 312 (same effect).

In *Trouser Corporation v. Goodman & Theise*, 153 F. (2d) 284, 287, 288 (C. C. A.), in which certain statements made by an agent were held to be erroneously admitted in evidence as against his employer over the objection of the defendant in direct examination of the witness, the court said, pp. 287, 288:

> "But the defendant waived this objection. In cross-examination of the [same] witness—the defendant asked for the [same] statement. Objection to competency is lost if the objecting party himself offers the same testimony as evidence."

In *Norwood v. Great American Indemnity Co.*, 146 F. (2d) 797, 799, 800 (C. C. A.), the court held that admission of testimony in direct examination of the plaintiff over objection of counsel for the defendant, even if erroneous, did not affect the substantial rights of the parties under Rule 61 of the Federal Rules of Civil Procedure (28 U. S. C. A. ff. #723c) or Sec. 269 of the Judicial Code, as amended (28 U. S. C. A. #391), for the reason that:

> "The record discloses that on cross-examination of the plaintiff, appellant's counsel elicited substantially the same evidence, concerning the conversation to

> which the plaintiff had previously testified in direct examination over the objection of the [appellant]. . . . In these circumstances, . . . whatever error may have been committed in admitting evidence in the first instance, the error became harmless in the sense that it became unavailing to the appellant as a ground for reversal."

In the instant case although the testimony in question had been previously objected to by counsel for the defendants, it was subsequently voluntarily adduced in behalf of the defendants without objection or exception, or reservation thereof, on cross-examination of the same witnesses. On cross-examination of the plaintiff relative thereto, counsel for the defendants examined the witness fully and exhaustively respecting the same conversation, asked the witness to state the entire conversation, to repeat and reiterate it in every detail;—whereupon the plaintiff testified to the *identical conversation elicited on direct examination; also to further statements made by Glogowski at the time with respect to the latter's purpose or motive in taking Concord Street (Route 126) to Route 20,* in preference to Route 9; and *also to further statements made by Glogowski at the time bearing on the question of negligence of both the corporate and the individual defendant in the maintenance and operation of the motor truck at the time of the accident,* which further statements constituted *original evidence* not theretofore introduced by the plaintiff. Substantially the same procedure was followed by counsel for the defendants in cross-examination of the witness Davis relative to the same conversation.

Under such circumstances counsel for the defendants waived and abandoned his prior objection to the admission of the evidence in question. So far as the record goes, the testimony on the same subject matter adduced on cross-

examination of the witnesses without objection or exception, or reservation thereof, as well as the testimony of additional statements made by Glogowski bearing on the issue or negligence, remained evidence in the case as against both the corporate and the individual defendant. Such evidence was entitled to its full probative value or force as evidence of the fact that the defendant Glogowski was driving the truck in the scope of his employment by the corporate defendant and in pursuance of its business interests, irrespective of whether such testimony was technically incompetent as against the corporate defendant to establish the latter fact. *Ventromile v. Malden Electric Co.*, 317 Mass. 132, 135. *DuBois v. Powdrell*, 271 Mass. 394, 397. *Douglas v. Holyoke Machine Co.*, 233 Mass. 573, 575. *Diaz v. U. S.*, 223 U. S. 442, 450. *Jackson v. Colonial Provision Co.*, 314 Mass. 177, 180. Incompetent evidence which has been admitted without objection "remains evidence in the case", *Rapson v. Leighton*, 187 Mass. 432, 435; *Comm. v. Mannos*, 311 Mass. 94, 115; *Comm. v. Capalbo*, 308 Mass. 376, 382, 383, "is entitled to its natural and full probative force on all issues in the case to which it may be applicable". *Ventromile v. Malden Electric Co.*, 317 Mass. 132, 135; *Pochi v. Brett*, 319 Mass. 197, 203; *Comeau v. Beck*, 319 Mass. 17, 19; *Stearns v. Warren*, 284 Mass. 268, 275; *Spiller v. Atchison, Topeka & Sante Fe*, 253 U. S. 117, 130, and "may be weighed with other evidence and given any evidentiary value which it may possess". *Mahoney v. Harley Private Hospital*, 279 Mass. 96, 100. *Ryan v. DiPaolo*, 313 Mass. 492, 494.

Consequently, the case falls within the rule that "the admission or exclusion of merely cumulative evidence that adds nothing to evidence already in the case, does not require the sustaining of exceptions, even though there was

technical error." *Bendett v. Bendett,* 315 Mass. 59, 65, 66. *Abele v. Dietz,* 312 Mass. 685, 690, 691. *Comm. v. Mannos,* 311 Mass. 94, 114, 115. *Perivoliotis v. Eveleth,* 251 Mass. 444, 446, 447.

> "The original ruling of the trial judge [in direct examination of the plaintiff and Davis limiting the evidence of the conversation as against the defendant Glogowski merely] had not become the law of the trial—and did not preclude the admission of other evidence of the conversation even on cross-examination of the same witnesses." *Comm. v. Parrotta,* 316 Mass. 307, 312. *DiAngelo v. United Markets, Inc.,* 319 Mass. 143, 145. *Ryder v. Board of Health of Lexington,* 273 Mass. 177, 179, 180.

In the latter connection it is to be noted that, although the judge had previously ruled on direct examination of the plaintiff that the evidence of the statements made by Glogowski did not bind the corporate defendant, (R. 93) the judge modified or qualified this ruling immediately after the statements, previously objected to, were elicited on cross-examination of the plaintiff without objection or exception or application for restriction of their use. At the latter point in the trial the judge stated to the jury that he would make an additional ruling later on with respect to the probative force that such conversation would have with respect to the issues involved in the case. (R. 99.) Nor did the trial judge make any ruling with respect to the evidence of the conversation in question when culled in cross-examination of the witness Davis. Since at such stage of the trial, the prior objections to the conversation were waived and abandoned by counsel for the defendants, due to his cross-examination covering the same subject matter, and since at such time the evidence was entitled to its full probative value against the corporation both on the issue whether Glogowski was acting within the

scope of his employment, and on the issue of negligence, the corporate defendant cannot be heard to complain of the judge's charge to the jury, in which he instructed them, that the evidence was competent to show Glogowski's state of mind or intention as bearing on the issue of whether he was acting within the scope of his employment. Under the circumstances the instruction was more than favorable to the corporate defendant who had lost his right to object to the evidence of the conversation on all issues in the case, and it cannot be heard to complain of the ruling sufficiently favorable to it.

In brief, the exception to the charge in the above respect taken by counsel for the defendants was of no avail to the corporate defendant. Its objection to the competency of the evidence was waived and lost. The evidence brought out on cross-examination was entitled to its full probative force at the time of the defendant's exception to the charge. It was too late then to save an exception respecting competency. *Ryder v. Board of Health of Lexington,* 273 Mass. 177, 179. *Cummings v. National Shawmut Bank,* 284 Mass. 563, 568. *Orpin v. Morrison,* 230 Mass. 529, 532. *Randall v. Peerless Motor Car Co.,* 212 Mass. 352, 384. *Comm. v. Johnson,* 199 Mass. 55.

The corporate defendant contends that the foregoing rule relative to waiver of a prior objection by cross-examination eliciting the same subject matter, is inapplicable as against the corporate defendant on the circumstances of this case. It is argued that the same attorney acted as counsel for Glogowski and the corporate defendant; that since at the time of the cross-examination of the witnesses relative to the declarations in question there was in effect a prior ruling by the trial judge limiting the evidence of such declarations solely as against the defendant Glogow-

ski, there was no occasion for cross-examination in behalf of the corporate defendant, and it must be assumed that in cross-examining the witnesses counsel was acting for and in behalf of the individual defendant Glogowski alone. But we have seen that the original ruling by the trial judge had not become the law of the case *Janback v. Aamunkoitto Temp. Soc.*, 273 Mass. 45, 50. *Comm. v. Parrotta*, 316 Mass. 307, 312, and did not preclude the doctrine of waiver by cross-examination eliciting the same subject matter. *Comm. v. Parrotta*, 316 Mass. 307, 312. *Di Angelo v. United Markets, Inc.*, 319 Mass. 143, 145.

And quite contrary to the above suggestion of the corporate defendant, it must be assumed that the cross-examination relative to the remarks of Glogowski was being conducted in behalf of the corporate defendant alone since the state of mind or intention of Glogowski *was entirely immaterial and irrelevant in the case against Glogowski.* Or, at best, it must be assumed that the attorney who was representing both defendants during the trial of the case, *was representing both defendants at all stages thereof,*— including the occasion of his cross examination of witnesses relative to the remarks of Glogowski—, unless and until it was specifically brought to the attention of the court that he was acting solely in the interest of one of the defendants. The question whether counsel was representing one or both of the defendants cannot be determined by considering the advisability or sagacity of his representing one or both of the defendants. Nor can it be determined by the undisclosed intention of counsel. It is a fundamental and well established rule that when there are two or more parties, or two or more cases are tried together, evidence offered is admissible as against all parties unless application is made for restriction of its use as against designated par-

ties. *Solomon v. Dabrowski,* 295 Mass. 358, 359, 360. *Comm. v. Shephard,* 313 Mass. 590, 598. *Palmer v. Hoffman,* 318 Mass. 109, 119 and cases cited. *Eastman v. U. S.,* 153 F(2d) 80, 84, cert. denied, 66 S. Ct. 1342. *U. S. v. Daily,* 139 F(2d) 7, 9. Rule 51 (F. R. C. P.) 28 U. S. C. A., ff. #723c. The latter rule is applicable here. If the corporate defendant wished to obviate a waiver by it of its prior objections under the doctrine of the *Di Angelo* and *Parotta* cases, it was incumbent upon counsel acting for both defendants to ask for a limitation or restriction to the individual defendant alone of the evidence elicited in cross-examination.

*B. The Exception to the Charge Was Not Validly Taken.*

Moreover the exception to the charge in itself, even if it was not too late, was a general one without any application made for restriction of the evidence. The declarations made by Glogowski contained statements in the nature of admissions, and otherwise, which were binding on Glogowski on the issue of negligence. Such statements were admissible in the count against him, even assuming that they may have been incompetent to bind the corporate defendant. Where several cases are tried together and evidence is offered which is competent as to one or more parties and not competent as to others, a general exception to the charge based on the admission of such evidence cannot prevail. The excepting party must call the attention of the trial judge to any limitations which he believes should be imposed upon the application of the evidence as to issues and parties in order to save a valid exception. *Potter v. Baldwin,* 133 Mass. 427, 428, 429. *Solomon v. Dabrowski,* 295 Mass. 358, 359, 360. *Comm. v. Shephard,* 313 Mass. 590, 598. *Salonen v. Paanenen,* 1947 Mass. Ad. Sh. 29, 36.

*Palmer v. Hoffman,* 318 U. S. 109, 119 and cases cited. *Eastman v. U. S.,* 153 F (2d) 80, 84; cert. denied 66 S. Ct. 1342. *U. S. v. Daily,* 139 F (2d) 7, 9. Rule 51 of the Federal Rules of Civil Procedure (28 U. S. C. A., ff. #723c). This the corporate defendant failed to do.

*C. & D. The Evidence In Question Was Merely Cumulative.*

The admission of the evidence of the declarations of Glogowski, even if erroneous, and assuming that such error was not cured by the same evidence being elicited on cross-examination by counsel for the defendants, did not injuriously affect the substantial rights of the corporate defendant on another ground.

The remarks of Glogowski were material only insofar as they tended to establish Glogowski's state of mind or intention in his traveling out of Framingham on Route 126 to Route 20, rather than on Route 9. His choice of one Route in preference to the other was, in turn, significant merely because of the corporate defendant's contention that he had deviated from the route specifically assigned to him by his employer, which was allegedly Route 9. However, as previously pointed out, whether Glogowski was given express instruction to pursue Route 9 out of Framingham was a question for the jury on contradictory evidence, and the jury could find that no such instruction was given him. The jury could find on abundant evidence that at the time of the accident Glogowski was travelling with his truck and trailer loaded with wool on a route out of Framingham (126) which he reasonably could have been expected to take by his employer,—a route which led directly to Route 20, which was described in the evidence as a "through way", "a common highway for travel",

and "a main route used for transportation into New York and New Jersey". *Such permissible findings of the jury rendered entirely inconsequential the question why or wherefore Glogowski did not take Route 9, rather than Route 126 to Route 20, out of Framingham.* Under such circumstances reception of the testimony of the remarks of Glogowski was entirely harmless and unprejudicial to the corporate defendant.

Furthermore, the declarations of Glogowski bearing on the question of his intent or state of mind in travelling over Concord Street at the time of the accident were in substance to the effect that he took Route 126 to Route 20 "over there" to Worcester because the latter route was not as congested as the other route (the Turnpike) and that he could make better time on Route 126 and Route 20 to Worcester. Such evidence of his state of mind or intention was merely cumulative of other ample and abundant evidence in the record (relative to the comparison, with respect to the volume and character of traffic and volume and character of hills, between the two means of travel to the intersection of Routes 9 and 20 outside of Worcester) *from which the jury could properly find or infer the identical or substantially identical fact that Glogowski's purpose in travelling on the route he was on was to make better time and avoid the congestion in traffic on Route 9.* For this added reason, the judge's charge to the jury relative to the declarations of Glogowski, even if technically erroneous, could work no injury to the corporate defendant. *Inness v. Boston, Revere Beach and Lynn R. R. Co.,* 168 Mass. 433, 435. *Duggan v. Bay State Street Railway,* 230 Mass. 370, 383. *Coneton v. Old Colony Street Railway,* 212 Mass. 28, 29. *Comerford v. N. Y., N. H. & H. R. R. Co.,* 181 Mass. 528, 530. *Mathewson v. Edison*